No. 76-1367

In the Supreme Court of the United States

OCTOBER TERM, 1976

HYSTER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not officially reported. The decision and order of the National Labor Relations Board (Pet. App. A4-A14) are reported at 220 NLRB 1230.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1977, and a petition for rehearing was denied on March 3, 1977. The petition for a writ of certiorari was filed on April 1, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that an employee who had been discharged in violation of the National Labor Relations Act made reasonable efforts to mitigate his wage losses by becoming self-employed after he was unable to obtain other employment.

STATEMENT

Arthur J. Wolfe was unlawfully discharged by Hyster Company (the Company) in October 1970, and the Board ordered that he be reinstated with backpay.[1] He was reinstated in April 1974 (Pet. App. A6). However, when the parties were unable to agree on the amount of backpay due Wolfe from the date of his unlawful discharge to his reinstatement, a supplemental hearing was held. The record thereof disclosed the following facts:

From the week of his discharge through March 1971 Wolfe regularly reported to the state unemployment office and applied for work at eight or more local industrial employers, visiting and telephoning some several times (Pet. App. A6-A7). During this time Wolfe was rejected for an opening at a local utility company under circumstances that led him to believe that his prior union activity had been held against him (Pet. App. A7, A12). In April 1971, Wolfe ceased active job searching and established a small construction enterprise, specializing in home repair and remodeling (Pet. App. A7). Wolfe did so because he believed that his discharge for union activities had hindered his ability to obtain other work. He believed that he was qualified for construction work because of his mechanical ability and his experience in home remodeling gained as an

[1] *Hyster Co.*, 195 NLRB 84, enforced, C.A. 7, Nos. 72-1288 and 72-1403, decided March 20, 1973.

employee of a contractor and in repairing his parents' home (Pet. App. A7-A8).

Wolfe devoted approximately 60 hours per week to his repair business, made sizeable investments in tools and equipment, advertised for business, and hired employees to assist him (Pet. App. A8, A13). His gross receipts increased each year and exceeded $40,000 in 1973, although his profits were low (Pet. App. A13, A6 n. 2). Although Wolfe had ceased his active search for a job, he remained available for other employment, and he accepted the Company's offer of reinstatement in April 1974 (Pet. App. A6, A13).

The Board concluded that Wolfe acted reasonably to mitigate his wage losses prior to reinstatement by the Company, both in his initial search for work and his subsequent self-employment (Pet. App. A4, A12-A13). Accordingly, the Board awarded backpay to Wolfe in an amount equal to what he would have earned with the Company, reduced by his actual earnings (Pet. App. A15). The court of appeals enforced the Board's order (Pet. App. A1-A3).

ARGUMENT

A wrongfully discharged employee is generally entitled to backpay in an amount equal to what he would have earned but for his discharge, reduced by his actual earnings. *Phelps-Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 197-200. Although the amount of backpay may be reduced if the employee neglects to mitigate his loss, the employee is required to make only "reasonable efforts" to secure other employment. *National Labor Relations Board* v. *Arduini Corp.*, 394 F. 2d 420, 423 (C.A. 1). He or she need not take unsuitable work simply to reduce the employer's liability for its unlawful conduct. See *Florence Printing Co.* v. *National Labor Relations Board*, 376 F. 2d 216, 220-221

(C.A. 4), certiorari denied, 389 U.S. 840. Furthermore, self-employment is "an adequate and proper way for the injured employee to attempt to mitigate his loss of wages," even when other job opportunities are available. *Heinrich Motors, Inc.* v. *National Labor Relations Board*, 403 F. 2d 145, 148-149 (C.A. 2). And see *National Labor Relations Board* v. *Mastro Plastics Corp.*, 354 F. 2d 170, 179 (C.A. 2), certiorari denied, 384 U.S. 972:

The question whether Wolfe failed to make reasonable efforts to mitigate the Company's backpay liability involves the application of these principles to the facts of this particular case.[2] Such an issue does not warrant review by the Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 480. In any event, the Board properly concluded that Wolfe's decision to become employed was reasonable. Wolfe resorted to self-employment only after attempts to obtain other employment had proved unsuccessful. He had skills and experience that qualified him for the construction business, and he devoted his full energies and time to that business, attaining a gross income exceeding $40,000 in 1973. The Company adduced no probative evidence that any other suitable employment opportunities were available to Wolfe during the backpay period (Pet. App. A12-A13). In these circumstances, Wolfe's self-employment diminished, rather than increased, the Company's backpay liability, and the Company is not entitled to any further reduction of the award.

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[2]There is no conflict among the circuits. The opinion of the court of appeals (Pet. App. A2-A3) cites approvingly several of the decisions upon which petitioner relies (Pet. 8, 10) and is consistent with other pertinent cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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